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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JADE T. BERTRAM, A Minor, etc.,

Plaintiff and Appellant,

v.

STEVEN VOUIS,

Defendant and Respondent.

JADE T. BERTRAM, A Minor, etc.,

Plaintiff and Respondent,

v.

STEVEN VOUIS,

Defendant and Appellant.

B161872

(Los Angeles County
Super. Ct. Nos. VC028417,
VC036409.)

APPEALS from orders of the Superior Court of Los Angeles County. Judges Patrick T. Meyers and Daniel S. Pratt. Order in VC036409 reversed; order in VC028417 affirmed.

Perona, Langer, Beck, Lallande & Serbin, M. Lawrence Lallande, Sr., and Kathleen M. Wynen for Plaintiff, Appellant, and Respondent.

Carroll, Kelly, Trotter, Franzen & McKenna, Gregory M. Hurlbert, David P. Pruett and Lori A. Conway for Defendant, Respondent, and Appellant.

These consolidated appeals arise from two medical malpractice actions brought by plaintiff Jade Bertram, a minor, against, among others, Dr. Steven Vouis, the physician who delivered her. Plaintiff appeals following the sustaining without leave to amend of defendant's general demurrer and the grant of defendant's motion to strike the complaint in plaintiff's second action, on grounds the voluntary dismissal of her first action as against defendant, effected without court approval, constituted res judicata. Defendant appeals from a subsequent order that set aside the dismissal of the first action because it had been taken without judicial approval. We conclude that the voluntary dismissal of the minor plaintiff's first suit, without requisite court approval, did not constitute res judicata, and that it was properly set aside. We therefore reverse the dismissal of plaintiff's second action, and affirm the order setting aside the dismissal of her original action.[1]

FACTS

Plaintiff's original action was filed at the end of 1998, against defendant Vouis (defendant) and Whittier Hospital Medical Center (the hospital). Plaintiff appeared through her mother, Kimberly Bertram (mother) as guardian ad litem. Both mother and plaintiff's father also joined as plaintiffs. The complaint alleged that plaintiff, born in January 1998, had suffered brain damage and consequent sensory deficiencies from her complicated delivery, requiring that she be committed to a long-term care facility.

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[1] The record on appeal does not contain an order of dismissal of the second case, following the sustaining of the demurrer, and plaintiff's notice of appeal addresses the nonappealable order sustaining that demurrer. In the interests of justice, we deem that order to incorporate an order of dismissal, and treat the notice of appeal as referring to it. (See *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 3, fn. 1.)

During the delivery, mother and father allegedly suffered emotional distress and, in mother's case, physical injury.

Defendant noticed a motion for summary judgment, for November 29, 1999. Contending defendant had not been negligent, the motion relied on an obstetrician-gynocologist's declaration that defendant had met the standard of practice in conducting plaintiff's delivery.

Plaintiff's counsel, Gordon Soladar, requested and obtained from the court, without opposition, a two-month continuance of the summary judgment hearing, on the basis that two medical experts, from whom he expected to obtain opinions that defendant had not met the standard of practice, had not yet completed their study of the case. Plaintiff's papers opposing the summary judgment motion were ordered due by January 14, 2000.

On December 13, 1999, Solodar noticed for January 14, 2000 a motion to withdraw as attorney for all plaintiffs. He declared that they refused to listen to or follow his advice, creating a breakdown of attorney-client relations. Soladar attached a substitution of attorney in pro. per. signed by mother, but he noted that court approval was required to effect his withdrawal as counsel for plaintiff, a minor.

The following day, Solodar filed and the clerk entered a dismissal of the complaint as to defendant, without prejudice. This filing apparently stemmed from Solodar's belief that he had no basis for opposing defendant's motion for summary judgment, and from an assurance by defendant's counsel that abandonment of the case would not lead to a malicious prosecution claim.[2]

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[2] In a declaration filed later in the action, defendant's attorney described communications to this effect between Solodar and himself, after the motion for summary judgment had been continued. Counsel stated he had assured Soladar that responsibility for plaintiff's injuries was attributable to the fault of a hospital technician, and Soladar had stated his experts were not supporting plaintiff's claim.

When he appeared on the motion to withdraw on January 14, 2000, Soladar informed the court that the summary judgment motion, to which he had not filed opposition as then due, would become moot by reason of the voluntary dismissal. Soladar explained that "We intended to file a dismissal with prejudice as to Dr. Vouis," and that "on the record I am stating that dismissal is with prejudice . . . ."

The trial court proceeded to grant Solodar's motion to withdraw as attorney for plaintiff and her parents, effective in two weeks. The court also vacated the hearing date for defendant's motion for summary judgment. On the same day, January 14, 2000, Solodar filed, and the clerk entered, a dismissal with prejudice of the complaint as to defendant. (Soladar endorsed this dismissal to state it "amend[ed]" the December dismissal to reflect "with prejudice.")

During the preceding month and a half, mother and father apparently had been in custody, for drug-related reasons. After they failed to appear for a status conference on the case as against the hospital, the court set a hearing regarding removal and replacement of mother as plaintiff's guardian ad litem. On April 28, 2000, the court so ordered, and appointed Attorney Daniel J. Wilson as new guardian ad litem. The court also dismissed the action as to mother and father. Subsequently, the court granted Wilson's motion to engage Attorney M. Lawrence Lallande and his firm as attorneys for plaintiff. On October 16, 2000, Lallande filed a dismissal of plaintiff's first action without prejudice.

On February 21, 2002, plaintiff, through her new attorney and guardian ad litem, commenced a second action, for medical malpractice and other torts. Named as defendants were defendant, the hospital, and another physician; defendant was charged only in the malpractice cause of action. Defendant responded with a demurrer and a motion to strike. Both contended that the new action against defendant was barred by the January 14, 2000 voluntary dismissal with prejudice of the original action as to him. The

demurrer asserted that that dismissal was res judicata of plaintiff's present claim against defendant.[3]

In opposition, plaintiff asserted that the dismissal of her first action was "null and void," as it had been taken without judicial approval, as required for the compromise of a minor's claim by Code of Civil Procedure section section 372 and Probate Code section 3500.[4] In reply, defendant stressed that the dismissal had never been set aside, and questioned plaintiff's ability to traverse it in the present setting.

The trial court sustained the demurrer without leave to amend, and granted the motion to strike the complaint as against defendant. Stating that Soladar had had "apparent authority" to dismiss plaintiff's first case with prejudice, the court found that dismissal to be res judicata of the present claim. With regard to the validity of the

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[3] As a second ground of demurrer, defendant claimed the pendency of another action (the original one). That ground was inapposite, as the case was not then pending. (*National Auto. Ins. Co. v. Winter* (1943) 58 Cal.App.2d 11, 16-17.)

[4] Undesignated section references hereafter are to the Code of Civil Procedure. Section 372, subdivision (a), provides in part that "The . . . guardian ad litem . . . appearing for any minor . . . shall have power, *with the approval of the court in which the action or proceeding is pending*, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward . . . or to release or discharge any claim of the ward . . . ." (Italics added.) Probate Code section 3500, subdivisions (a) and (b), provides: "(a) When a minor has a disputed claim for damages, money, or other property and does not have a guardian of the estate, the following persons have the right to compromise, or to execute a covenant not to sue on or a covenant not to enforce judgment on, the claim, unless the claim is against such person or persons: [¶] (1) Either parent if the parents of the minor are not living separate and apart. [¶] (2) The parent having the care, custody, or control of the minor if the parents of the minor are living separate and apart. [¶] (b) *The compromise or covenant is valid only after it has been approved, upon the filing of a petition, by the superior court of either of the following counties*: [¶] (1) The county where the minor resides when the petition is filed. [¶] (2) Any county where suit on the claim or matter properly could be brought." (Italics added.)

dismissal, the court stated: "[Plaintiff's'] opposition distills to a belated and collateral attack on proceedings in the prior action, which took place more than eighteen months ago and remain unchallenged therein. Such an opposition is unpersuasive and unavailing herein."

Plaintiff timely noticed an appeal from the trial court's order. Two weeks later, plaintiff filed a motion in her original case, to set aside its dismissal with prejudice as to defendant. Plaintiff contended the January 2000 dismissal was void, both because it had been rendered without judicial approval under section 372 and Probate Code section 3500, and because Attorney Soladar had filed it without authorization by plaintiff's then guardian ad litem, her mother. The motion included a declaration by mother that she had never agreed or authorized Soladar to file a "permanent dismissal" of plaintiff's claim against defendant. In addition plaintiff's successor guardian ad litem (Wilson) and attorney (Lallande) declared that their reviews of Soladar's case file had not reflected the dismissal with prejudice. Lallande stated he had first learned of it in a May 2002 letter from defendant's attorney, which had enclosed a copy of the dismissal and solicited a voluntary dismissal of defendant from the second case.

Defendant opposed the motion to set aside, contending that, in granting Solodar's motion to withdraw as plaintiff's counsel on January 14, 2000, the court had implicitly approved his dismissing plaintiff's claim against defendant with prejudice. Defendant also asserted that plaintiff's mother and Attorney Lallande had known of the dismissal soon after its filing, and therefore the motion to set aside had not been made within a reasonable time.

Stressing the paramount policy that compromise or dismissal of a minor's claim be subject to court approval, the court granted the motion to set aside the dismissal of the first action, with respect to plaintiff only. The court recommended that the reinstated first case be consolidated with plaintiff's second case.

Defendant filed a notice of appeal from the order setting aside the dismissal. Following a stipulation by the parties, we ordered defendant's appeal consolidated with plaintiff's appeal, from the order terminating the second case.

DISCUSSION

Both appeals before us turn upon the validity of the January 2000 dismissal with prejudice of plaintiff's first action against defendant, under and by reason of section 372 and Probate Code section 3500. Those statutes require judicial approval before a guardian ad litem or parent of a minor may compromise an action or claim by the minor. Although section 372 is more directly apposite to the present case, which involves a litigated claim, Probate Code section 3500 is not, as defendant asserts, inapplicable by reason of plaintiff's having had a guardian ad litem, which is different from the guardian of the estate to which the statute refers. But under either of the statutes, the necessity for judicial approval of the January 2000 dismissal was and is clear. "Once a guardian ad litem is appointed, the action may not thereafter be compromised, settled or dismissed without court approval, thus insuring the interests of the child have been fully and fairly considered." (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1847.)

There was no court approval of the dismissal with prejudice of plaintiff's original action against defendant. No such approval was sought, and none of the procedures required by California Rules of Court, rules 378 and 7.950 et seq. were pursued. We reject defendant's position that the court rendered such approval implicitly at the January 14, 2000 hearing on Attorney Soladar's motion to withdraw. An inference of approval cannot be drawn from an absence of it. And the fact that the court was made aware of, and alluded to, Soladar's intention to dismiss the case with prejudice does not reflect a statutory, discretionary approval of that dismissal. Indeed, the court told Soladar that the content of his dismissal was "not before the court today."

Defendant's further position that Soladar was entitled to effect the dismissal independently is baseless. The authority defendant cites, *Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167, 1175, ruled only that a guardian ad litem had been entitled

to dismiss a minor's claim *without prejudice*. Even in litigation not involving minors as parties, compromise or dismissal of the client's claim exceeds an attorney's authority, inherent, implied, or apparent. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404, 406.) Here, absent the judicial approval required by statute, the voluntary dismissal was, if not void, at least voidable. (See *Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, 1605-1606; cf. *Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 507-508.)

With regard to plaintiff's appeal, the invalidity of the first case's dismissal disqualified it as res judicata to bar plaintiff's second case. (*Everett v. Everett* (1976) 57 Cal.App.3d 65.) In *Everett,* a mother had settled a paternity claim without court approval. When the child later sued his mother and father to establish the latter's paternity, the trial court sustained the father's demurrer, without leave to amend, on grounds the first judgment was res judicata. The Court of Appeal reversed, noting that the first action had encompassed a claim of the minor, which could not be waived or compromised without judicial approval under former Probate Code section 1431 (a predecessor to Probate Code section 3500). The first judgment therefore did not bind the minor (*Everett, supra,* at p. 69), and "The prior action brought by plaintiff's mother against defendant was not res judicata on the issue whether defendant is plaintiff's father." (*Id.* at p. 68, fn. omitted.)

Similarly, in *County of Shasta v. Caruthers, supra,* 31 Cal.App.4th 1838, a mother voluntarily dismissed a paternity case with prejudice, in exchange for payments by the alleged father. When the county district attorney filed suit on behalf of the child, for child support and a declaration of paternity, the father obtained summary judgment on the basis the prior suit constituted collateral estoppel. The appellate court reversed, finding that res judicata did not apply because the child had not been a party to the prior action, and noting that if she had been, its compromise would have required court approval. (*Id*. at pp. 1843-1844.)

In treating the prior dismissal as res judicata notwithstanding it had never been approved as required, the trial court in plaintiff's second case characterized plaintiff's resistence to that disposition as "a belated and collateral attack[,] . . . unpersuasive and unavailing." This was error. When defendant sought to establish by demurrer the defense of res judicata, plaintiff simply pointed out, from the same record, how and why the dismissal on which defendant relied did not legally constitute res judicata. That was entirely appropriate. Furthermore, contrary to the trial court's implication, a judgment or dismissal entered in violation of section 372 remains voidable by the minor throughout and beyond her minority. (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 71, pp. 127-128.) It follows that the court in the second case erred in sustaining defendant's demurrer, based on res judicata, and granting his motion to strike.

That the January 2000 dismissal with prejudice was voidable, as just discussed, also supports the trial court's subsequent order setting it aside, the subject of defendant's appeal.[5] Defendant's particular challenges to this order lack merit.

Defendant contends that the dismissal was at best subject to being vacated upon a motion made within a reasonable time, and that plaintiff's motion, filed nearly three years after entry of the dismissal, was not thus timely. As previously observed, however, plaintiff's right to contest the dismissal persisted throughout her minority. Furthermore, the authorities defendant cites for his "reasonable time" restriction actually hold that a dismissal, voidable because obtained by an attorney without authority, may be set aside at any time. Thus, in *Whittier Union High Sch. Dist. v. Superior Court, supra,* 66

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[5] Defendant acknowledges a split of authority as to whether an order vacating a voluntary dismissal is appealable. (See *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1366; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (Rutter 2003) ¶ 2:168.5, pp. 2-88-2-89.) We need not explore the question, because even were defendant's appeal defective, we would resolve it as a petition for writ of mandate, as did the court in *Arnaiz, supra,* 96 Cal.App.4th at pages 1386-1387.

Cal.App.3d at page 509, the court summarized: "[D]ismissal of a cause of action by an attorney acting without any authority from his client is an act beyond the scope of his authority which, on proper proof, may be vacated at any time. Obviously, such action requires strong and convincing proof, and the longer the delay in the application for relief the stronger and more convincing the factual proof should be." Applying this test to the disabling absence of judicial approval, the showing of that deficiency here was so clear as to justify granting plaintiff's motion at the juncture it was made.[6]

Defendant also contends that plaintiff was not entitled to relief from the dismissal because she failed to tender an opposition to defendant's former motion for summary judgment, which defendant insists was required by section 473, subdivision (b). That statute provides that an application for relief under it must be accompanied by "a copy of the answer or other pleading proposed to be filed . . . ." The short answer to this contention is that plaintiff's motion to set aside the dismissal was not made under section 473, nor did it have to be. (See *Whittier Union High Sch. Dist. v. Superior Court, supra,* 66 Cal.App.3d at pp. 506-508.)

Defendant also complains, in two respects, about the extent of relief the court afforded on plaintiff's motion to set aside. First, defendant asserts, the court should have restored the first action to its exact status when the dismissal was filed, that is, defendant's summary judgment motion should have been reinstated, to be heard in 10 days, without any written opposition by plaintiff. We perceive no mandate for such a disposition. Indeed, it would have been an abuse of discretion to have denied plaintiff, whose original counsel had chosen to dismiss the case himself instead of filing opposition

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[6] *Whittier Union High Sch. Dist. v. Superior Court, supra,* 66 Cal.App.3d at page 508, also indicates that the length of time after the client's learning of the improper dismissal is a relevant consideration. In the present case, the trial court was entitled to credit the evidence that plaintiff's guardians ad litem had learned of the dismissal well after its entry.

to defendant's motion, an extension of time to file one. Second, defendant argues that reinstatement of the first action was improper, because even after the dismissal with prejudice was set aside, the original dismissal of defendant without prejudice remained. We do not agree. The trial court properly disregarded Soladar's dismissal without prejudice, which the record showed had been filed by mistake instead of the dismissal with prejudice.

Finally, defendant devotes extensive parts of his briefs to the premise that plaintiff could not have taken a dismissal *without prejudice* in order to circumvent defendant's motion for summary judgment. Defendant relies principally on *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, which held that a plaintiff could not dismiss its case without prejudice "after an adverse tentative summary judgment ruling has been announced and the hearing has commenced and is continued for the express and exclusive purpose of permitting the plaintiff an opportunity to produce opposition evidence it claims was previously unavailable." (*Id.* at pp. 768-769; see also *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253 [disregarding dismissal without prejudice filed a day before summary judgment hearing, when plaintiff had filed no opposition to defendants' motion].)

Such dismissals have been permitted, however, in less extreme circumstances, perhaps more resembling plaintiff's first action against defendant. (See *Zapanta v. Universal Care, Inc., supra,* 107 Cal.App.4th 1167 [minor entitled to dismiss medical malpractice action without prejudice one day before opposition due on defendant's summary judgment motion based on compliance with the standard of practice]; *Mossanen v. Monfared* (2000) 77 Cal.App.4th 1402 [minor allowed voluntary dismissal after his attorney withdrew and medical malpractice defendants filed motion for summary judgment based on compliance with standard of care].) But at bottom, defendant's argument is irrelevant. At issue on these appeals is the validity of a dismissal with prejudice – not without prejudice – which was taken in disregard of the statutory requirements for judicial approval of compromises of minors' claims and lawsuits.

Whether plaintiff properly could have dismissed her case without prejudice does not bear on the question.

DISPOSITION

The order of dismissal in case no. VC 036409 is reversed. The order setting aside the dismissal of case no. VC028417 is affirmed. Plaintiff shall recover costs.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.